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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-831

PHILIP N. CALABRESE, individually and as a Councilman and Mayor of Sand City, and FRANK ZABROWSKI, individually and as Chief of Police of Sand City, California,
Petitioners and Cross-Respondents,

and

ELLIS POTTER, PEARL L. PENDERGAST, MARK MEADOWS and WILSON OLIVER, individually and as Councilmen of Sand City, California,
Additional Cross-Respondents,

vs.

PRESALEAN AVERY, personal representative of BP[illegible]OV AVERY, deceased, and MELVIN C. WILLIAMS,
Respondents and Cross-Petitioners.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Cross-Petitioners have failed to show that special and important reasons exist to grant their petition. (Rule 19).

First, cross-petitioners claim the Court of Appeals should have reversed the district court's grant of a new trial, because the district court took twelve months (actually about nine months) to decide the motion. They rely on *James v. Appel*, 192 U.S. 129, 24 S.Ct. 222, 48 L.Ed. 377 (1904). *James v. Appel* did not involve the right of a federal judge to postpone decision of a new trial motion; it involved the application of Arizona territorial law in a territorial case.

Second, cross-petitioners claim the Court of Appeals should have reversed the district court's grant of a new trial, because the district court could not ground its decision on a finding the verdict was against the weight of the evidence, without a motion for directed verdict. However, the Court of Appeals was not required to consider the point, because it found that the misconduct of witness Avery, and the misconduct of three of the trial jurors, properly required a new trial. (App. to petition, pp. xxii, xxvii).

Third, cross-petitioners claim the Court of Appeals should have reversed the district court's grant of a new trial on the ground of misconduct of Avery, because there was no request for a mistrial. [Cross-Petitioners incorrectly state that counsel never requested the improper remarks be stricken. (App. to petition, p. xiii)]. Cross-Petitioners rely on *Carness*

v. United States, 187 F.2d 719 (9th Cir. 1951) and *Everett v. Southern Pacific Company*, 181 F.2d 58 (9th Cir. 1950) to support the proposition that a request for a mistrial is an absolute prerequisite to a new trial motion based on a witness's prejudicial remarks. However, there are decisions from the same circuit which rendered the decision below. Furthermore, *Carness* and *Everett* are distinguishable. Neitheir case involved the grant of a new trial without a request for mistrial. Instead, those cases involved denial of a new trial where, amongst other circumstances, there had been no request for mistrial. The lower court's exercise of discretion was upheld in each case. In the present case the Court of Appeals held, in effect, that a district court's discretion in these matters is so broad that it can grant a new trial although no request for mistrial was made. The court cited its decision in *Simpson v. Union Oil Company*, 411 F.2d 897, 908 (9th Cir. 1969), in which it had quoted from *Moist Cold Refrigerator Company v. Lou Johnson Company*, 249 F.2d 246, 256 (9th Cir. 1957), as follows:

> "But having permitted the jury to come to its conclusion on the facts, the trial judge then had the right, and indeed the duty, to weigh the evidence, as he saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in his conscientious opinion, the verdict is contrary to the weight of the evidence or based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice."

Fourth, cross-petitioners claim that the Court of Appeals should have reversed the district court's grant of a new trial, because the district court was biased against them, as shown by its comment that the amount of the verdict was unsupported by the evidence. One of cross-respondents' grounds for a new trial was that the amount of the verdict was against the weight of the evidence. (Cross-Petition, p. 5). Therefore, it was appropriate for the district court to comment on the size of the verdict.

Finally, the Court of Appeals in this case held that the misconduct of three trial jurors warranted a new trial. Cross-Petitioners do not challenge this holding.

CONCLUSION

For the foregoing reasons, the Court should deny the cross-petition for a writ of certiorari.

Respectfully submitted,

NEAL A. CABRINHA,
Counsel for Petitioners
and Cross-Respondents.

Dated, January 30, 1975.